No. 8888.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF

POMOC OIL COMPANY,

DEBTOR.

J. A. SASSO,

Appellant.

vs.

HERBERT C. GOLDMAN, as Trustee in Bankruptcy of Pomoc Oil Company, a corporation, Debtor,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing the Jurisdiction of the District Court and the Circuit Court of Appeals.

This is an appeal made from an order of the District Court of the United States for the Southern District of California [Tr. p. 26], denying the petition for review and confirming the findings and order of the referee [Tr. pp. 18-19]. The District Court has jurisdiction over bankruptcy proceedings under section 2 of the Bankruptcy Act (11 U. S. C. A.). The District Court has jurisdic-

tion to review the order of the referee in bankuptcy under General Order in Bankruptcy No. XVII. The Circuit Court of Appeals has jurisdiction under section 25 of the Bankruptcy Act (48 U. S. C. A.).

The Pomoc Oil Company filed a petition under the provisions of section 77B of the Bankruptcy Act on March 19, 1937. An order of liquidation was made by the District Court under section 77B (c) (8) of the Bankruptcy Act and referring the matter to Benno M. Brink, Esq., one of the referees in bankruptcy of said court on July 19, 1937. The order of the District Court on petition for review of the order of the referee in bankruptcy was entered on May 14, 1938. The order of the District Court allowing an appeal to the Circuit Court of Appeals was entered on June 14, 1938 [Tr. p. 32].

STATEMENT OF THE CASE.

Appellant, J. A. Sasso, filed a claim in the estate of Pomoc Oil Company, a corporation, bankrupt, based upon a judgment obtained in the state court prior to the filing of the petition in bankruptcy. An abstract of the judgment was attached to the claim as an exhibit [Tr. p. 13]. The Referee made an order subordinating the claim to the claims of other general creditors [Tr. pp. 18-19], which is tantamount to the disallowance of the claim by reason of the fact that the estate of the bankrupt is insufficient to pay other general creditors in full.

George Marcell and Anna Marcell, his wife, were the owners of the capital stock of Pomoc Oil Company at the time that appellant advanced $3000.00 which the corpora-

tion used to start drilling operations. George Marcell wrote a letter to appellant [Tr. pp. 24-25], the material portions of which are as follows:

> "As per our conversation, the Pomoc Oil Company is about to develop this property, and I offer you one-half (½) of my net profits in either the development or the sale of said lease, for the consideration of your advancing the preliminary, or so-called front money to put the company in a position to qualify its lease. In other words, to spud in the well before August 21st.
>
> The amount of money necessary to do this, would be approximately twenty-five hundred ($2500.00) dollars. However, it may run a little higher, and if it does, I will expect you to advance a small additional sum.
>
> The company will finance the development of this property in the best possible manner, and I know the proposition will be very profitable to both of us.
>
> It is necessary for me to start rigging up at once, and ask that you accept this letter immediately if the transaction is satisfactory to you. I will give you a 90-day note of the Pomoc Oil Company, due in 90 days, this note endorsed by both Mrs. Marcell and myself in exchange for your check for twenty-five hundred ($2500.00) dollars."

George Marcell [Tr. p. 9] testified:

> "This interest that was being discussed of which Dr. Sasso was to receive one-half was my stock interest. While myself and my wife at first executed an individual note, within a short time thereafter that individual note was replaced by a corporation note of the same amount and date. I made the statement

to him that if the company did not pay him I would, at some future date, pay him. But the company did give its note, and the money was deposited in the corporation's bank account. That is what started the corporation bank account. It was loaned to the company, there is no question about that. It was used on this lease, every cent of it."

No evidence was introduced and no finding made that claimant was either entitled to or did participate in the management and control of the bankrupt's business operations.

First: The Referee in Bankruptcy Erred in Admitting Evidence for the Purpose of Contradicting the Judgment Obtained by Petitioner Against the Debtor, and the District Court Erred in Confirming the Referee's Findings and Order Based Upon Such Evidence.

Second: The Referee in Bankruptcy Erred in Refusing to Make an Order That the Judgment Obtained by Petitioner Against the Said Debtor Was Conclusive and Binding Upon This Estate and the Trustee in Bankruptcy, and the District Court Erred in Confirming the Findings and Order of Said Referee Based Upon Such Ruling.

Appellant requests permission to present one argument applying to the two foregoing assignments.

"The court having acquired jurisdiction its adjudication is conclusive upon the parties concerned, until set aside by review or appeal, and it cannot be questioned collaterally."

Collier on Bankruptcy, p. 30;

Savin v. Larkin-Green, 218 Fed. 984, affirmed 222 Fed. 814.

"Judgments rendered before the filing of the bankruptcy petition when offered for proof, may be attacked for fraud, collusion, want of jurisdiction, under the usual rules; but not otherwise."

Remington on Bankruptcy, par. 833;

In re Stucky Trucking Co., 243 Fed. 287, 38 A. B. R. 690;

In re Tietenberg, 15 A. B. R. (N. S.) 580;

In re Rubin, 24 Fed. (2d) 289, 11 A. B. R. (N. S.) 626;

Lyders v. Peterson, 88 Fed. (2d) 9, 33 A. B. R. (N. S.) 535.

"The state court had jurisdiction of the parties and the subject matter, and the inequity claimed was also an issue. All matters in issue were adjudicated against him. United States District Court is of limited jurisdiction, 28 U. S. C. A., paragraph 371, and reviewing state court judgments is not of the powers granted."

Lyders v. Peterson, 88 Fed. (2d) 9 (C. C. A. 9), 33 A. B. R. (N. S.) 535.

Third: The Referee in Bankruptcy Erred in Finding That Petitioner Entered Into an Agreement Whereby He Was to Receive an Interest in the Debtor's Estate, and the District Court Erred in Confirming Such Finding.

The referee found [Tr. p. 18] as follows:

> "The court finds that said claimant entered into an agreement wherein and whereby the said claimant was to receive an interest in the above entitled debtor estate and that the said claimant is a co-adventurer and joint adventurer with the above named debtor in the development of the well of the above named debtor."

As will be noted from the letter from George Marcell, who, with his wife Anna Marcell, was the owner of the capital stock of the debtor corporation [Tr. pp. 24-25], said George Marcell offered appellant nothing more than "one-half (½) of my net profits in either the development or the sale of said lease."

George Marcell testified [Tr. p. 9] "this interest that was being discussed of which Dr. Sasso was to receive one-half was my stock interest."

The record contains no evidence, oral or documentary, indicating an agreement on the part of the corporation to convey any portion of its assets to the claimant, and from the uncontradicted testimony of George Marcell, above quoted, it clearly appears that the extent of his offer was one-half of his individual interest in the development or sale of the lease.

Fourth: The Referee in Bankruptcy Erred in Finding That Petitioner Was a Co-Adventurer and Joint Adventurer With the Debtor in the Development of the Well of the Debtor, and the District Court Erred in Confirming Such Finding.

Fifth: The Referee in Bankruptcy Erred in Ordering That the Claim of Petitioner Be Subordinated and Junior in Right to the Rights and Claims of General Creditors, and the District Court Erred in Confirming Such Order.

Sixth: That in the Absence of Evidence That Petitioner and Claimant Was Engaged in Joint Participation in the Conduct of the Business of the Debtor, and in Absence of a Finding to Such Effect, the Referee in Bankruptcy Erred in Ordering That Petitioner and Claimant Was a Co-Adventurer and Joint Adventurer With the Debtor, and That His Claim Be Subordinated and Junior in Right to the Rights and Claims of General Creditors, and the District Court Erred in Confirming Such Finding and Order.

Appellant requests permission to present one argument applying to the three foregoing assignments.

There was no evidence or finding of joint participation in the conduct of the bankrupt's business operations by appellant and the bankrupt, without which appellant could not be found to be a joint adventurer.

A recent decision of the California Supreme Court, *Spier v. Lang,* 4 Cal. (2d) 711, 716 (1935), states the law applicable. In that case the plaintiff sought to recover for materials furnished for the purpose of drilling an oil well. The well was drilled by the lease holder, but other persons had advanced necessary money. Plaintiff joined these other persons who had advanced money on the theory that

a partnership or joint adventure existed. The court, in upholding a finding that no such relationship existed, said, at page 716:

> "The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced. (Vanderhurst v. deWitt, 95 Cal. 57, 62 (30 Pac. 94, 20 L. R. A. 595); Coward v. Clanton, 122 Cal. 451, 454 (55 Pac. 147); Peoples Lumber Co. v. McIntyre & Peters, 179 Cal. 780 (178 Pac. 954); Martin v. Sharp & Fellows Contracting Co., 34 Cal. App. 584 (168 Pac. 373); Auditorium Co. v. Barsotti, 40 Cal. App. 592 (181 Pac. 413); O. Krenz C. & B. Works Inc. v. England, supra; Black v. Brundige, 125 Cal. App. 641 (13 Pac. (2d) 999).) The foregoing conclusion and cited cases are in conformity with the definition of the partnership relation contained in the Civil Code (sec. 2400, Stats. 1929, p. 1898), formerly contained in sec. 2395), which includes as an essential element the joint participation in the conduct of the business. The presence of the same *element is necessary to constitute the parties joint adventurers.* (Italics mine.) See, also, Martin v. Peyton, 246 N. Y. 213 (158 N. E. 77); Pierce v. McDonald, 168 App. Div. 47 (153 N. Y. Supp. 810); Farmers Co-op. Elevator Co. v. Farmers Union Co-op. Exch., 127 Okl. 275 (260 Pac. 755); Gille Hardware & Iron Co. v. Harrison, 89 Mo. App. 154; Cudahy Packing Co. v. Hibou, 92 Miss. 234 (46 So. 73, 18 L. R. A. (N. S.) 985).)"

Furthermore, this opinion, at page 717, points out that no presumption of partnership relation can be drawn in such a case.

> "The plaintiffs urge that subdivision (4) of section 2401 of the Civil Code, providing that the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner, has some controlling weight in this case. It has no bearing, however, in the absence of any evidence that profits were received, and there is no evidence of the payment of any to the defendants. Furthermore, when the facts warrant its application, that subdivision is to be construed and applied in connection with subsection (d) thereof which provides that such an inference is not to be drawn where the profits were received as interest on a loan although the amounts vary with the profits of the business."

Another recent case, perhaps even more in point, is *Treat v. Murdock,* 8 Cal. (2d) 316, 320, 321 (1937). In that case the defendant had advanced money for the exploitation of a mine. A note was given defendant for the money advanced. This note was to be paid from proceeds of production of the mine, and defendant was to continue to receive either 14% of the net proceeds of the mine, or 10% of the stock of any corporation to be formed, *after the note was paid in full.* The California Supreme Court, holding that no partnership existed, said, at page 320:

> "Nor does the contract of October 27th, which fixed the agreement of the parties, establish any partnership relation of Murdock with the appellants. It gave appellants no interest in the mine but only the right to require payment of the amount owing to them from a percentage of the net proceeds of the mine.